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No. 80-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

vs.

J. J. CURRAN and JACQUELYN L. CURRAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE ROSENTHAL & COMPANY

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MOTION OF ROSENTHAL & COMPANY FOR LEAVE TO FILE ITS BRIEF AS AMICUS CURIAE

Rosenthal & Company moves this Court pursuant to Rule 36 of the Supreme Court Rules for leave to file its brief as an *Amicus Curiae*. Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc. has consented to this filing of an *Amicus* brief by Rosenthal & Company. However, the Respondents have not consented.

Rosenthal & Company is making this filing at this time because only in late September 1981 did the case of *Middlesex County Sewerage Authority v. National Sea*

Clammers Association, ... U.S. ....., 101 S. Ct. 2615 (June 25, 1981) come to the attention of Rosenthal's counsel.

Counsel for Rosenthal believes that whereas the opinion of the United States Court of Appeals for the Fifth Circuit in *Rivers v. Rosenthal & Company*, 643 F.2d 774 (1980) petition for cert. pending, No. 80-1542, provides a scholarly analysis of the legislative history, that the most recent *Middlesex County* opinion signals a new and helpful method to be used by this Court for analyzing the legislative process.

In support of this Motion for Leave to File as *Amicus Curiae* in this particular cause, Rosenthal & Company asserts as follows:

1. Rosenthal & Company ("Rosenthal") is a Chicago-based commodity futures brokerage firm which engages as a commodities broker or futures commission merchant ("FCM") in transactions on domestic and international commodity markets.

2. Rosenthal is directly affected by the issues raised by this appeal for a number of reasons:

a. Rosenthal is presently litigating before this Court the appeal from the decision in *Rivers v. Rosenthal & Company*, 634 F.2d 774 (5th Cir., 1980). As the prevailing party before the Fifth Circuit, Rosenthal has opposed the petition for certiorari filed March 10, 1981 (No. 80-1542). The Fifth Circuit dealt with the exact question which was certified for review here, but the Court of Appeals concluded that no private right of action could be implied under the Commodity Exchange Act ("CEA"). Should the instant case be decided differently it would directly and adversely affect Rosenthal's position in the *Rivers* case and it would do so without Rosenthal being allowed to respond in its own behalf.

b. As an FCM, Rosenthal is subject on a continuing basis to the regulatory provisions of the CEA, and to the rules and regulations promulgated thereunder by the CFTC. The issue raised by this Appeal directly affects the relationships between Rosenthal and its customers.

c. The decision in this Appeal will impact the procedures governing the resolution of disputes between commodities brokers and their customers in the future. If a private right of action is implied, resort to CFTC conducted reparations procedure and to other non-judicial means for resolving disputes, such as arbitration will be effectively undermined; the long term cost of resolving customer complaints will increase; and the clear alternative among the remedies offered by Congress will be substantially confused.

3. Rosenthal seeks to file an *amicus curiae* brief because it believes certain important questions of law have not been adequately presented in the briefs filed with the Court so far. These questions concern (1) the application of the test for determining Congressional intent as it has been recently developed by the Court, and (2) the application of the doctrine of reenactment to the 1974 and 1978 Amendments to the CEA.

4. Rosenthal believes these questions of law have not been adequately presented because no brief has adequately explored the significance of the *Middlesex County Sewerage Authority v. National Sea Clammers Association*, ... U.S. ....., 101 S. Ct. 2615 (1981) in relation to the legislative history of the 1974 and 1978 Amendments to the CEA, and because only one brief, the one filed by the CFTC, explores the application of the doctrine of reenactment. The CFTC has raised this question for the first time and argues a position adverse to Rosenthal's interest.

5. Rosenthal's *amicus curiae* brief satisfies both deficiencies. The *Middlesex County* opinion, as Rosenthal submits, further clarifies the Court's developing analysis for determining the implication of private damage claims. Rosenthal's brief relates the analysis used in *Middlesex County* to the prior opinions issued by the Court on this question deriving, Rosenthal believes, a new and helpful method for analyzing the legislative process. No other brief has argued the relevance of the *Middlesex County* opinion; in fact, one brief, the brief filed by the CFTC, attempted to diminish its clear guidance and assistance here. In its brief Rosenthal also seeks to assist the Court by including crucial passages from the legislative history at issue here which have not been referred to nor reproduced by any other party.

6. Rosenthal is especially concerned with the application of the doctrine of reenactment to the 1974 and 1978 Amendments to the CEA. The recently filed CFTC brief has raised this question for the first time. No party has argued against its application. Rosenthal is concerned lest the doctrine be applied by the Court and a private right be thus implied. In its brief, Rosenthal explores at great depth the doctrine and its exceptions concluding that the doctrine is inapplicable. Reenactment was never mentioned in the legislative history nor ever seriously pressed by any party until now.

7. Unless Rosenthal is allowed to file its *amicus curiae* brief, the Court will have no brief before it setting forth the significance of the *Middlesex County* case for the instant appeal nor will it have both sides of the legal issue arising from the CFTC's contention that the doctrine of reenactment governs.

For the foregoing reasons, Rosenthal respectfully moves this Court for leave to file its *amicus curiae* brief.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Commodity Exchange Act ("CEA") creates an implied private right of action for violations of the CEA?

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BRIEF OF AMICUS CURIAE ROSENTHAL & COMPANY

INTEREST OF ROSENTHAL & COMPANY

Rosenthal & Company ("Rosenthal") is a Chicago-based commodity futures brokerage firm which engages as a commodities broker or futures commission merchant ("FCM") in transactions on domestic and international commodity markets.

Rosenthal is interested in and directly affected by the issues raised by this appeal for a number of reasons. First, as an FCM, Rosenthal is subject on a continuing basis to the regulatory provisions of the Commodity Exchange Act ("CEA") and to the rules and regulations promulgated thereunder by the Commodity Futures Trading Commission ("CFTC"). The issue raised by this appeal, namely whether a cause of action for damages in federal district court will be implied under the CEA in favor of private parties, is one which directly affects Rosenthal's business and the legal relationships between Rosenthal and its customers.

Secondly, Rosenthal is presently litigating the exact question certified for review in the above captioned appeal in another appeal lodged before this Court, [*Rivers v. Rosenthal & Company*, 634 F.2d 774 petition for cert. pending, No. 80-1542 (filed March 10, 1981)], and Rosenthal's position will thus be directly affected by the ruling in this case.

Finally and most importantly, Rosenthal is interested in the impact that the decision in this case may have on the procedures that will govern the resolution of disputes between commodities brokers and their customers in the future. The issue in this case affects rights beyond those of the immediate parties. If the Sixth Circuit's decision in this case is upheld and private damage actions in commodities transactions become generally available,

resort to the CFTC conducted reparations procedure and to other non-judicial means for resolving disputes, such as arbitration, will be effectively undermined. *Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1245 (D.C. Cir., 1978). The long term cost of resolving customer complaints will increase, and the clear alternative among the remedies offered by Congress will be substantially confused. For these reasons, Rosenthal has sought leave to file this brief as *amicus curiae* in support of the position of Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") Petitioner herein.

SUMMARY OF ARGUMENT

Briefly, it is Rosenthal's position that no private right of action should be implied under the CEA. Rosenthal contends that Congressional intent to create a private cause of action under the CEA is not shown by the legislative history of the CEA and is in fact inconsistent with the structure and purpose of the statute and that the CFTC's use of the reenactment doctrine and the doctrine of implied repeal is misapplied in this case. Rosenthal concludes that the implication of a cause of action in federal court for money damages under a statute which already specifically provides an administrative forum in which this type of relief is available is an impermissible extension of the implication doctrine and an invasion of the prerogatives of Congress.

ARGUMENT

I.

CONGRESS DID NOT INTEND THE IMPLICATION OF PRIVATE ACTIONS PURSUANT TO SECTION 4b, NOR THE ADOPTION OF SUCH A PRACTICE BY REENACTMENT.

Petitioner and the CFTC make two arguments. First, they argue that a private damage remedy was available to commodities customers under the CEA prior to 1974 and that when Congress amended the CEA in 1974, it intended this remedy to continue to be available. Second, they argue that the recognition of a private right of action under the CEA is warranted under the test of *Cort v. Ash*, 422 U.S. 66 (1975). Rosenthal responds here only to the first argument regarding the reenactment doctrine. The arguments based on the *Cort v. Ash* test have been explored in depth by the briefs filed by the parties and *amici* as well as by the opinions of the Fifth Circuit in *Rivers v. Rosenthal & Company, supra*, and the Second Circuit in *Leist v. Simplot*, 638 F.2d 283, cert. granted, Nos. 80-757, 80-895 and 80-936 (February 23, 1981).

In its *amicus* brief, the CFTC argues in the alternative. On the one hand the CFTC contends that the 1974 Amendments to the CEA preserved, with little comment from Congress, a private right of action on the theory of the doctrine of reenactment. On the other hand, the CFTC contends that Congress indicated its intent to preserve the private right in the jurisdictional savings clause found in the 1974 Amendments. By these arguments the *amicus* seeks to perform a sleight of hand. Rather than examine the expressed intent of Congress, the CFTC hopes to lead the Court into deciding this case on a long since discredited principle of law. Both of the CFTC's arguments are based upon the proposition that

private implication must be assumed from Congress' silence or inattention so long as a federal law has been violated and someone was injured. The CFTC hopes to perform this sleight of hand by erecting false issues based on the burden of demonstrating Congressional interest.

Rosenthal opposes these contentions. Its arguments are twofold. First, Congress never intended the implication of a private right of action under the CEA as amended in 1974 and 1978. Second, Congress never intended to adopt the implication of a private right of action by reenactment with the 1974 and 1978 Amendments to the CEA. The intent of Congress governs both issues. Whether private rights are to be implied pursuant to new federal legislation or whether they are to be adopted pursuant to legislative reenactment, the question is the same. Did Congress affirmatively indicate it?

Such an inquiry falls to both parties. If neither finds an affirmative indication of intent, then the advantage is lost to the party claiming under the proposed right.

A. Congress Never Intended That A Private Right Of Action Be Implied Under The CEA As Amended In 1974 And 1978.

The CFTC reaches the conclusion that Congress intended the implication of a private damage remedy from the language of the jurisdictional savings clause of the CEA as amended in 1974 and 1978. It attempts to bolster this conclusion by reference to a few cryptic and isolated remarks Congress made during the long and complicated history of the legislative process culminating in the passage of the new and fully revamped CEA. Rosenthal rejects the CFTC's conclusion. It is based on statutory provisions and informal remarks best described as ambiguous and truncated.

Numerous times within recent years this Court has dealt with the efforts of lower courts to imply a private right. In each instance in an effort to interpret Congressional intent, it has reviewed and analyzed the legislative record. From these analyses, it appears that certain elements or moments in the legislative process are more likely to indicate the Congressional intent and it is these crucial elements to which the Court returns again and again for guidance.

When analyzing the legislative history of any statute with a view to implication of a private right, this Court gives three key parts of the legislative process special attention. These are as follows: (1) efforts to enact provisions granting private rights; (2) the scheme of enforcement; and (3) the language of jurisdictional savings clauses. *See, Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, ... U.S. ....., 101 S. Ct. 2615 (1981). *Northwest Airlines, Inc. v. Transport Workers Union of America*, ... U.S. ....., 101 S. Ct. 1571 (1981); *California v. Sierra Club*, ... U.S. ....., 101 S. Ct. 1775 (1981); *Universities Research Assn. v. Contu*, ... U.S. ....., 101 S. Ct. 1451 (1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 100 S. Ct. 242 (1979); *Touche Ross & Co. v. Redington*, 422 U.S. 560, 99 S. Ct. 2479 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946 (1979). Rather than argue generally that Congress did not intend to imply a private right of action and then cast about in the record to support this conclusion, Rosenthal seeks instead only to draw the Court's attention to these three parts of the legislative process. Once the legislative history of these parts has been set forth, the conclusion is inescapable. Congress did not intend that a private right of action be implied under the CEA.

1. All Efforts To Include A Provision Creating A Private Right Of Action In The Federal Courts For Commodities Customers Were Defeated.

The 1974 Amendments to the CEA were originally introduced as H.R. 11955 in the House of Representatives. *Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93rd Cong., 2d Sess. 333-410 (1974). H.R. 11955 borrowed heavily from an earlier bill introduced in the House on October 30, 1973 by Representative Neal Smith, denominated H.R. 11195. Congressman Smith, in testimony before the House Agriculture Committee, noted the relationship between his bill and H.R. 11955:

> "The new bill which the committee introduced on December 11, H.R. 11955, is identical or very similar to H.R. 11195 which I had introduced on October 30, in a vast majority of its provisions." *Id.* at 2.

In his own bill, Congressman Smith had incorporated a provision to create an express private right to damages for persons injured by violations of the CEA. Section 17 of his bill (H.R. 11195) provided:

> "(3) Any person violating any provision of this Act or any regulation thereunder shall be liable to any person injured thereby for treble the amount of the damages sustained as a result of such violation."

The House Agriculture Committee, despite its heavy utilization of the Smith bill, did not expressly incorporate this provision—or *any* private remedy except arbitration or the administrative remedy of reparations—in the bill adopted by it.

In 1973, several bills to amend the CEA were introduced in the Senate, including bills by Senators McGovern (S. 2578) and Hart (S. 2837). Senator McGovern's bill contained the same provision as the Smith bill, allowing private actions for treble damages by persons injured under the CEA. *Hearings on S. 2485 et*

al. Before the Senate Comm. on Agriculture and Forestry, Part I, 93rd Cong., 2d Sess. 77.

Senator Hart offered a more complex provision in his bill (S. 2837), calling for the creation of a private right to single damages in most cases but for treble damages in cases of "willful violation":

CIVIL ACTION FOR DAMAGES

"Sec. 505(a) Any person who is injured by a violation of any provision of the Act or regulation or order issued thereunder by the Commission or any exchange, may bring a civil action for restitution in any district court having jurisdiction of the party who caused such injury. In any such action, an order of the Commission [finding violation] shall constitute prima facie evidence as to liability between the parties.

(b) Any person who is injured by a willful violation of any provision of this Act, or regulation or order issued thereunder may bring a civil action for three-fold the damages sustained by him, and the cost of suit including reasonable attorney's fees, in any district court having jurisdiction of the party who caused such injury." *Id.* at 118-19.

The Hart bill also dealt with the *prima facie* effect in civil cases of criminal convictions under the CEA and tolling of the statute of limitations for private actions while a Government proceeding is pending. The Senate Agriculture and Forestry Committee did not adopt any of these measures, nor did the full Senate or the Congress.

The original CEA contained no provision for private damage actions and, despite the efforts of Congressman Smith and Senators McGovern and Hart in 1974, the CEA remains devoid of such a provision. Instead, there exists only the right by injured persons to obtain single damages in a reparation proceeding administered by the CEA. The alternative remedy created by Congress is

arbitration conducted either by an exchange or a third party.

In contrast, Section 15 of the 1978 Amendments to the CEA, 92 Stat. 865, 872 (1978), expressly provides to state attorneys general the right to bring in Federal District Court injunctive or damage actions on behalf of citizens in their respective states. Section 15 further requires written notice of the action to the CFTC and gives the CFTC the right to intervene. This provision was enacted even though the court in *Kelly v. Carr*, 442 F. Supp. 346 (W.D. Mich., 1977), had already held that such an action existed, just as prior to the 1974 Amendments, the courts had held that an implied right of action existed under the CEA. The adoption of Section 15 by Congress evidences its intent that additional rights of action under the CEA would be established not by implication by the courts, but by explicit language in the CEA providing specific safeguards for CFTC involvement. This remedy created by Congress would only be used by public prosecutors. The fact that Congress has not adopted such a provision allowing private rights of action can only lead to the conclusion that Congress did not intend for such actions to be available.

2. The Remedial Scheme Is Comprehensive And Complete Supplanting Any Need To Supplement The CEA's Enforcement By An Implied Private Action.

Congress gave the CFTC a broad panoply of powers to enforce the CEA—much broader than that given to the SEC for example—including the power to assess civil monetary penalties, to declare market emergencies which could halt all trading in any commodity futures, and to seek injunctive relief in the federal courts. It is the comprehensiveness of the remedies provided under the CEA which most strongly militate against im-

plications. The comprehensiveness indicates the omission of private actions was deliberate, *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 100 S. Ct. 242 (1979).

As part of the 1974 Amendments, Congress added Section 14 of the CEA (7 U.S.C. §18) which establishes trial-type reparation proceedings to be utilized by parties aggrieved by commodity transactions. There is no minimal jurisdictional amount.

Reparation proceedings were established to insure uniform interpretations and decisions at the initial adjudication by persons with experience and expertise in commodity transactions. Section 14(a) of the CEA (7 U.S.C. §18) provides for an aggrieved party to file a complaint with the CFTC, and the section further provides, *seriatim*, for investigations of the complaint [7 U.S.C. §18(a)-(d)], reparations awards for damages [7 U.S.C. §18(e)], judicial enforcement of reparations awards [7 U.S.C. §18(f)], Court of Appeals review and various penalties [7 U.S.C. §18(g), (h)], all of which have been further refined by CFTC regulation. See 17 C.F.R. §§12.1-12-102.

Because of its flexibility, a reparations proceeding is unquestionably less complex, less expensive and less time-consuming than a trial in federal district court. A trial-type hearing is conducted in plaintiff's home city before an Administrative Law Judge ("ALJ") in which each party is:

> ". . . entitled to due notice of hearings, the right to be represented by counsel, the right to cross-examine witnesses, present oral and documentary evidence, raise objections, make arguments and move for appropriate relief. 17 C.F.R. §12.79(b).

At the conclusion of the hearing, the ALJ renders an opinion. The CFTC may review the initial decision within 30 days upon application of either party or on its

own motion. If the CFTC determines not to review, the initial decision becomes the final order in the proceeding. *See* 17 C.F.R. §12.84(e). In practice, all initial decisions are examined to determine whether they involve generally significant policy issues that the CFTC may wish to address consistent with its broad responsibilities to regulate the conduct of industry professionals.

If a party against whom an award has been made does not pay the award, the plaintiff may obtain enforcement of that order in a federal district court. Subject to the respondent's right to appeal, the order awarding reparations is final and conclusive. Section 14(f), 7 U.S.C. §18(f). The district court's jurisdiction is limited solely to enforcement of the award. Judicial review of the merits of a reparation decision is available only in the Courts of Appeals.

Unless a reparations award is timely paid after an appeal has been completed or the time for appeal has passed, a respondent's registration is automatically suspended and it is prohibited from trading on all contract markets until it shows to the satisfaction of the Commission that the full award, plus interest, has been paid. Section 14(h) of the CEA, 7 U.S.C. §18(h).

The only involvement of state courts arises under Section 13a-2 which gives to the state attorney generals (not private parties) the right to restrain violations or enforce the provisions of the CEA if the interests of the state residents are being adversely affected. The CEA provides that the state may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice . . . to obtain damages on behalf of their residents or to obtain such other relief as the court may deem appropriate.

The benefits to be derived from the reparations procedure would be largely defeated if plaintiffs were at liberty to ignore the reparations forum and bring damage actions in federal court. Since jurisdiction over commodities cases could be based on 28 U.S.C. §1337 as to which there is no minimum amount in controversy, *see Caulfield v. U.S. Department of Agriculture*, 293 F.2d 217, 222 n. 10 (5th Cir., 1961), even suits involving less than $5,000 could be brought in federal court with the right to a full judicial hearing if an implied cause of action were allowed. This would totally defeat the congressional intent to minimize the cost to the parties of prosecuting such claims.

Self-regulation by commodity exchanges and more recently industry futures associations is (and always has been) an important part of regulation of commodity transactions. In introducing the House bill which led to the 1974 Amendments to the CEA, Representative Poage made the following statement concerning the chilling effect that implied private rights of action were having on self-regulation:

> "Beginning approximately 50 years ago, the legal posture of exchange self-regulation began to change. Slowly the courts began to look upon exchange self-regulation as a guarantee to the public that its members would not violate its code of conduct. Additionally, when the Commodity Exchange Act was enacted, courts implied a private remedy for individual litigants in the Commodity Exchange Act. Thus, today the judgment of the board of directors of many of the exchanges in implementing decisions under self-regulatory functions is becoming increasingly a justiciable issue."
>
> "Attorneys for exchanges are now advising their clients to prune out rules or regulations where the enforcement capability is questionable. Instead of a

> situation where self-regulatory activities should be expanding for a given contract market, the exchange can now provide solid reasons for shrinking the protection given the customer and the public through self-regulation." Remarks of Representative Poage, 119 Cong. Rec. 41333 (1973).

Thus, as Representative Poage recognized, implication of a private right of action by this Court would seriously and negatively affect operations of the commodity exchanges which are at the very heart of the commodities industry.

Revisions to the reparations procedures in 1978 indicate Congress' continued commitment to having disputes between customers and brokers handled administratively rather than through private district court actions.

3. The Jurisdictional Savings Clause Neither Preserves Nor Creates A Private Right Of Action.

The jurisdictional savings clause of the CEA, Section 2(a)(1), 7 U.S.C. §2, provides that "nothing in this section shall supercede or limit the jurisdiction conferred on courts of the United States or any state." Those who would rely upon this provision to imply a private cause of action for damages also point to the remarks of Senator Talmadge to the effect that:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way.

120 Cong. Rec. 30459 (September 9, 1974).

A close reading of the legislative history shows, however, that reliance on this statement by Senator Talmadge and on the jurisdictional savings provision is

entirely misplaced as a basis for implying a private cause of action under the CEA.

The full quotation from Senator Talmadge, which the CFTC brief fails to reproduce (CFTC Brief p. 11, n. 14), shows that the jurisdictional savings provision was designed to preserve the jurisdiction of the federal courts to hear appeals from decisions by the CFTC in reparation proceedings. As Senator Talmadge remarked.

> It is hoped that giving the Commission this authority will somehow lighten the burden upon the courts, *but the entire appeal process* and the right of *final determination* by the courts are expressly preserved.

120 Cong. Rec. 30459 (1979) (emphasis added). The CFTC's interpretation of Section 2(a)(1) fails when Senator Talmadge's remarks are put in context. As the Court stated in *Fischer v. Rosenthal & Company*, 481 F. Supp. 53 (N.D. Texas 1978):

> While Plaintiff construes these remarks to mean that Congress intended to create a private court remedy, it is more reasonable to conclude that the remarks signify that Congress intended the courts' role as one of appeal and final determination after the initial determination is made in the administrative reparation proceeding, as provided by 7 U.S.C. §18.

This interpretation is the most plausible one. The jurisdictional savings clause was necessary to preserve the role of the federal courts in the administration of the reparations procedure. This role had to be preserved not only for appellate review, but also for enforcement proceedings. As the Senate Report which accompanied the 1974 Amendments stated:

> If a reparation award is not paid, the person for whose benefit it is made, would have three years to file an action in court. He would have his choice of courts: The United States district court for the district of his residence or the district where respondent has its principle place of business, or any state court having general jurisdiction of the parties.

Senate Report No. 93-1131, reprinted in U.S. Code Cong. & Adm. News 5843, 5869 (1974). *See also* 7 U.S.C. §18 (expressly providing for enforcement of reparation awards in the district courts).

The CEA's legislative history indicates that the "savings clause" was also introduced to preserve the jurisdiction of the federal courts over pending investigation proceedings. As Chairman Poage observed:

> In addition, the conferees wish to make clear that nothing in the act would supercede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC. *Congress was aware that there have been ongoing efforts by various State and Federal regulators to prevent some of these abuses . . . We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this act.*

120 Cong. Rec. H. 10,248 (daily ed. October 9, 1974) (remarks of Chairman Poage) (emphasis added).

In light of these alternative explanations for the passage of the jurisdictional savings provision, there is no basis for the conclusion that it was passed to preserve private damage actions which Congress never considered important enough to even mention in the Committee Reports.

The CFTC's conclusion that Section 2(a)(1) was designed to preserve private causes of action is not adequately supported by the legislative history. The Senate Committee on Agriculture and Forestry which proposed the amendment to Section 2(a)(1) heard almost 900 pages of testimony from 58 witnesses. *See Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93rd Cong., 2d Sess. pts. 1-3 (1974). During the course of that extensive testimony, the CFTC is able to point to only two statements which even mention private suits for damages. Yet even these statements clearly refer to Section 505 of S. 2837, an express statutory provision allowing damage actions under the CEA which was not enacted by Congress. Implied rights of action were not even mentioned by these witnesses.

The CFTC also failed to mention Senator Curtis' remarks in their entirety:

> "Mr. President, I understand that *the intent of the bill is to grant exclusive jurisdiction over commodity futures trading to the new Commission, except to the extent the bill specifies that other Federal and State agencies and Federal and State courts are to retain jurisdiction.* However, as I understand it, it is also the intent of the bill that, even in the cases where the State agencies and State courts retain jurisdiction, the Federal substantive law embodied in the Commodity Exchange Act as amended by the bill would preempt the field completely, so that if any substantive State law were contrary to or inconsistent with Federal law, the Federal law would govern. (Emphasis added). 120 Cong. Rec. S. 16,133 (1974).

On the Senate floor, Senator Curtis successfully urged Congress to repeal a sentence in the existing CEA that was to preserve "any State law applicable to any transaction enumerated or described" in certain parts of the CEA. Senator Curtis pointed out that the sentence was

not compatible with the CFTC's new exclusive jurisdiction and the intended preemption of all state agencies. He indicated that after the 1974 Amendments only the substantive law in the CEA would govern. Thus there is no support in the legislative history for the CFTC's argument that Congress contemplated that the "state courts, pursuant to their general jurisdiction, would entertain commodity claims involving standards embodied in the Act" (CFTC Brief pp. 11-12). In fact, Congress was referring to those provisions of the CEA which gave jurisdiction to the state and federal courts. There is no general grant of jurisdiction in the CEA to the state and federal courts. Rather Congress fashioned particular remedies for public prosecutors in the state and federal courts and did not give any jurisdiction to matters concerning private parties other than for appeal. A simple reading of Senator Curtis' so-called "explanation" quickly shows that it is nothing more than a restatement of the language of the jurisdictional savings clause itself. It casts absolutely no light on the reasons for its adoption.

The Commission's interpretation of the jurisdictional savings clause completely ignores the other possible reasons for the adoption of Section 2(a)(1) suggested by the statements of Senator Talmadge and Senator Curtis discussed above. Ignoring alternative explanations for changes in a legislative bill, however, tends to undermine the reliability of the conclusions that may be drawn from such an analysis. As this Court stated in *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) in rejecting the Government's analysis of the legislative history of a statute in circumstances remarkably similar to this case:

> These reasons . . . are not weakened by the Government's strained and unconvincing citation of the Act's legislative history.

> That argument is grounded in conclusions drawn from changes made without explanation in committee with respect to various provisions [of the Act]. Apart from the inconclusive character of the history, the Government's contention assumes that the only alternatives presented by the final form of the bill were indefinite duration for the incidents of the employment named and none at all. *This ignores the other possibilities considered in this opinion. . . .* Moreover, as has been noted, the most important committee changes relied upon were made without explanation. *The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.*

(Emphasis added).

The CFTC's argument in this case as to the significance of Section 2(a)(1) is also premised on "mute intermediate legislative maneuvers." *Id.* Likewise, in this case the CFTC assumes that the only explanation for the adoption of Section 2(a)(1) is the one which supports its desire for a private cause of action even though it must ignore all other explanations. Accordingly, there is no basis for the inference that Section 2(a)(1) evidences a Congressional intent to preserve an implied cause of action for damages under the Act.

B. Congress Never Intended To Adopt By Reenactment The Implication Of A Private Right Of Action Under The CEA.

Recognizing the practice prior to 1974 of implying a private right of action under the CEA, the CFTC contends that the 1974 Amendments to the CEA incorporate and preserve this judicial interpretation of the statute. The CFTC's argument, based on the doctrine of reenactment, is misplaced.

First Congress never was made aware nor affirmatively indicated its intent to adopt by reenactment an

implied private right of action under the CEA as amended in 1974. Second, the statutory language of the CEA, particularly the remedial provisions, was not reenacted "without substantial change," but was significantly altered in 1974. *See* 7 U.S.C. §1, *et seq.* Third, the reenactment doctrine is generally limited to decisions of courts of last resort. However, this Court had never considered the implied cause of action issued under the CEA prior to the complete revision in 1974. Fourth, the reenactment doctrine requires a long line of uniform judicial holdings. Most of the decisions cited by the Currans and the CFTC to establish the judicial acceptance of an implied cause of action under the CEA do not stand for the proposition for which they are cited. Finally, the reenactment doctrine is merely an aid to statutory construction, and may be disregarded in appropriate circumstances.

1. Congress Never Affirmatively Indicated Any Intention To Apply The Doctrine Of Reenactment To Preserve The Implication Of Private Actions.

This Court has ruled that in order to apply the "doctrine of reenactment" Congress must not only have been made aware of prior court decisions but must also have given some "affirmative indication" of such intent. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431-32, 75 S. Ct. 473 (1955); *Accord, NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 350-52, 73 S. Ct. 287 (1953); *Interstate Drop Forge Co. v. Commissioner*, 326 F.2d 743, 746 (7th Cir., 1964); *International Brotherhood of Operative Potters v. NLRB*, 320 F.2d 757, 760 (D.C. Cir., 1963). By no stretch of the legislative record can it be seriously argued that Congress generally knew of federal court decisions which implied private actions. Furthermore, there is absolutely no place in the legislative history where any mention of the reenactment doctrine by anyone is made.

The doctrine of reenactment is applicable only when the legislative record evidences general Congressional awareness of the prior judicial or administrative decisions. In *SEC v. Sloan*, 436 U.S. 103, 120-121 (1978), the SEC argued that the 1964 reenactment of the summary suspension power contained in the Securities Exchange Act of 1934 without disapproval of the Commission's interpretation of that power constituted Congressional approval of the Commission's construction of the statute. The Commission pointed out that its interpretation of the statute had been made known to Congress in committee hearings, and one Congressional committee actually recognized and approved of the SEC's prior practice under the statute. This Court nonetheless found this evidence of Congressional awareness insufficient and therefore concluded that application of the reenactment doctrine would be appropriate. In so holding, the Court stated:

> Although the section in question was reenacted in 1964, and while it appears that the Committee Report did recognize and approved of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber v. Allen*, 396 U.S. 168, 192 (1969).
>
> We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this.

SEC v. Sloan, *supra* at 121 (1978).

The legislative history in the instant case is similarly inconclusive concerning the general level of Congressional awareness of lower court decisions on the implied cause of action issue. In support of its position, the

CFTC refers to a letter from Sheldon Berens, an executive of a grain company, and to a statement made on the floor of the House by Rep. Poage (CFTC Brief pp. 6-7, 16). These scattered bits of evidence are wholly inconclusive proof of general congressional awareness of the availability of a private cause of action. *See March v. United States*, 506 F.2d 1306, 1314, ns. 30 and 31 (D.C. Cir., 1974).

An examination of the Committee hearings shows that neither the letter from Mr. Berens (addressed to a single Congressman) nor the remarks of Representative Poage bear any reference to judicial decisions approving of implied causes of action under the statute. Such passing references to statements in the legislative history of a statute are of little, if any, value. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 n. 20 (1977).

Assuming that Rep. Poage's colleagues in the House were able to catch his fleeting reference to the fact that some lower courts had judicially implied a private right of action, there is no indication that the members of the Senate were similarly informed. Perhaps most significantly, this notion of the private cause of action never found its way into any of the Committee Reports, nor did any Committee express its views on the issue, as occurred in the *Sloan* case. Under the circumstances, there is no basis for assuming general congressional awareness of judicial decisions "based only upon a few isolated statements in the thousands of pages of legislative documents." *SEC v. Sloan*, *supra* at 121.

Not only was Congress not aware of any lower court practice implying private actions but nowhere in the long detailed legislative history examining every detail of the 1974 and 1978 Amendments was there any reference by any legislator or any witness urging a reenactment theory or even mentioning the doctrine of

reenactment. Without an "affirmative indication," the CFTC's arguments based on the doctrine of reenactment must fall.

2. Since The 1974 Amendments Substantially Changed The CEA, The Reenactment Doctrine Does Not Govern.

The reenactment doctrine applies only when a statute is reenacted without substantial change. *United States v. Douglas Aircraft Co.*, 510 F.2d 1382 at 1392 (CCPA, 1975). There is no question that the 1974 Amendments to the CEA, the Commodity Futures Trading Commission Act of 1974 ("CFTCA") was a major revision of the CEA.

Prior to 1974 the CEA had been concerned exclusively with agricultural commodities and the regulatory agency was a part of the United States Department of Agricultural. The growth of the commodities industry, however, outstripped the expansion of the regulatory agency. For instance, agricultural futures other than trading in grains and meats was non-regulated futures trading.[1]

In 1974 Congress again amended the CEA and invested it with jurisdiction over *all* commodities—including coffee, sugar, silver, etc. In order to improve the regulation of commodity transactions and to achieve uniformity and consistency in such regulation, Congress created an independent federal regulatory agency, the

[1] Prior to the CFTC's creation on April 21, 1975, trading in coffee, gold, sugar, orange juice, and all commodity options was "unregulated". That is to say no regulatory agency had exclusive jurisdiction over the trading in these commodities so responsibility was shared by the Department of Agriculture, Bureau of Mines and the Securities Exchange Commission. This patchwork regulatory scheme was corrected by the 1974 amendments to the CEA which gave the CFTC exclusive jurisdiction over these areas of commodity trading.

CFTC, and invested it with exclusive jurisdiction over all commodity futures and options transactions.

Among other things, the 1974 Amendments provided a "comprehensive structure to oversee the volatile and esoteric futures trading complex." H.R. Rep. N. 975, 93rd Cong., 2d Sess. 1 (1974). As part of this comprehensive regulatory structure Congress provided for the CFTC, a new independent federal regulatory commission. Also included in the 1974 Amendments, Congress created reparations as a private right of action for individual speculators who suffer losses from their dealings with commodity professionals resulting from a violation of the CEA. These reparations proceedings are intended to resolve broker-customer disputes and to insure uniform interpretations of the CEA's provisions affecting this complex industry.

As noted in the Senate Report which accompanied the 1978 Amendments to the CEA: "The Commodity Futures Trading Commission Act of 1974 constituted a *significant and substantial revision* of the Commodity Exchange Act." S. Rep. No. 95-850, 95th Cong., 2d Sess. 12 (1978), *reprinted in* (1978) U.S. Code Cong. & Admin. News, p. 2098 (emphasis added). Accordingly, on this ground alone the presumption that Congress intended to ratify pre-existing judicial decisions is inapplicable herein. As the district court stated in *Stone v. Saxon*, 485 F. Supp. 1210 (N.D. Ill. 1979):

> "We are not at all sure that . . . awareness at the time of reenactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the (statutory) language. . ." *Securities and Exchange Commission v. Sloan*, 98 U.S. 1702, 1713 (1978). This *caveat* has added meaning in a case such as this, where the 1974 amendments were a substantial modification rather

than mere reenactment, of the pre-existing statutory scheme.

Id. at 1214. *See Rivers v. Rosenthal & Company,* 634 F.2d at 781 (5th Cir., 1980).

In *Rivers* the Fifth Circuit carefully examined the entire legislative history of the CEA. The *Rivers* court found "the CFTCA actually constituted 'the first *complete overhaul* of the Commodity Exchange Act since its inception.'" *Id.* at 781, quoting H.R. Rep. No. 975, 93rd Cong., 2d Sess. 1. The CFTCA for the first time expressly provided alternative forums for persons seeking redress from those responsible. This involved the arbitration provisions at 7 U.S.C. §7a(11) and the reparations provisions of 7 U.S.C. §18.

No other remedies or forums were afforded by Congress to public speculators to hear alleged violations of the CEA.

3. Congress Should Only Be Presumed To Adopt By Reenactment The Decisions Of Courts Of Last Resort.

It is recognized that the presumption that Congress adopts pre-existing judicial interpretations when it reenacts a statute without substantial change is generally stated in terms of interpretations by courts of last resort. *See United States v. Douglas Aircraft Co., supra* at 1397 n. 8; *Waterman-Bic Pen Corp. v. United States,* 223 F. Supp. 35, 44 (S.D.N.Y. 1963), *aff'd.,* 332 F.2d 711 (2d Cir., 1964). Since all of the cases cited by the CFTC dealing with the implied cause of action were decisions of inferior federal courts, this Court is free to disregard that presumption in construing the statute.

4. Prior Judicial Decisions Do Not Support Application Of The Reenactment Doctrine.

Application of the reenactment doctrine generally requires a long and well-settled prior judicial construction of a statute. *Shapiro v. United States*, 335 U.S. 1, 16 (1948); *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450 (1948). One decision construing an act does not approach the dignity of a well-settled interpretation. *United States v. Raynor*, 302 U.S. 540, 552 (1938). Even several cases if they employ only a cursory analysis are insufficient. *See T.I.M.E. v. United States*, 359 U.S. 464, 477 (1959). Furthermore, application of the reenactment doctrine may not be based on cases whose construction of the statute is at variance with the claimed interpretation, relates to a different provision of the statute or is not necessary to the holding of the case. *See New York v. Saper*, 336 U.S. 328, 335-40 (1948).

The cases cited by the CFTC to demonstrate the prior judicial construction of the CEA do not approach the dignity of a well-settled interpretation (CFTC Brief at 5-6, n. 5). Two cases cited, *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir., 1977) and *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355 (7th Cir. 1975), are clearly irrelevant to the reenactment doctrine insofar as it relates to the 1974 Amendments since Congress could not have been aware of decisions in 1974 that had not yet been decided. *See, e.g., Panama R.R. Co. v. Rock*, 266 U.S. 209, 212-13 (1924). Likewise inappropriate is *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), since it was not only reversed on appeal, but involved interpretations of the statute prior to the 1974 Amendments by the CFTCA. As the Supreme Court's decisions clearly show, a willingness to imply a cause of action under one section of a statute does not justify the implication of a cause of action

under another section. *See Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979) (cause of action implied under §215 of the Investment Advisers Act, but not under Section 206); *Touche Ross & Co. v. Redington*, 422 U.S. 560 (1979) [cause of action implied under Section 14(a) and 10b of the Securities Exchange Act of 1934, but not under Section 17(a)]. *See also Stone v. Saxon, supra.*

In *Booth v. Peavy Company Commodity Services*, 430 F.2d 132 (8th Cir., 1970), the Court's statement regarding a private remedy under the CEA was pure *dicta* wholly unnecessary to the decision in the case. Not only did the appellate court affirm a directed verdict for the defendant since there was no evidence of churning, but the court stated that "a private remedy for churning a commodity account is permitted by *either* §6d of the Commodity Exchange Act . . . *or* the applicable portions of the Securities Act of 1933 . . . and the Securities Exchange Act of 1934." *Id.* at 133 (emphasis added). In short, the Court never took a firm position on the private cause of action question and engaged in absolutely no analysis.

Petitioner and *amici* also cite the decision in *Gould v. Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972), for the proposition that a private cause of action exists under the Commodity Exchange Act. *Gould* stands for no such proposition. Rather, the Court there denied the defendant's motion to dismiss for lack of jurisdiction because the facts stated in the Complaint appeared to state a claim for relief under the federal securities laws. Furthermore, the Court expressly noted the dubious precedential value of the *Booth v. Peavy* case. *Id.* at 295, n. 6.

Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 767 (S.D.N.Y. 1972) is also inapplicable

since the Court dismissed the case against the plaintiff for failure to comply with Rule 23.1, of the Federal Rules of Civil Procedure. Any statement in the case concerning the CEA is purely *dicta*.

The remaining cases, *Arnold v. Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1972); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); and *Goodman v. H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967), do stand for the proposition for which they are cited that an implied cause of action as it existed under Section 4b of the CEA prior to 1974. Their analysis is cursory and standing alone they cannot support application of the reenactment doctrine.[2] *See T.I.M.E. v. United States, supra.*

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[2] It should be pointed out that the existence of lower court decisions implying a private cause of action under the Investment Advisers Act was insufficient to alter the decision in *Transamerica Mortgage Advisers, Inc. v. Lewis, supra.* The SEC had pointed out in its brief to the Supreme Court an impressive list of lower court decisions implying a private cause of action under §206 of the Act. (Brief for the Securities Exchange Commission as Amicus Curiae, at 5 n. 1.) Nonetheless, this Court found that no implied cause of action existed under §206.

This statement in the SEC's brief listing the lower court decisions under the Investment Advisers Act reads as follows:

> A number of district courts previously had found that private plaintiffs may sue to enforce Section 206 of the Investment Advisers Act. See *Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F. Supp. 171, 179 (N.D. Cal. 1977); *Fund of Funds, Ltd. v. Vesco*, (1976-1977) CCH Fed. Sec. L. Rep. ¶95,644 at 90, 197-90, 198 (S.D.N.Y. 1976); *Angelakis v. Churchill Management Corp.*, (1975-1976) CCH Fed. Sec. L. Rep. ¶95,285 at 98, 463-98, 464 (N.D. Cal. 1975); *Jones v. Equitable Life Assurance Society*, 409 F. Supp. 370, 373 (S.D.N.Y. 1975); *Bolger v. Laventhol, Kekstein, Horwarth & Horwarth*, 381 F. Supp. 260, 265, 268 (S.D.N.Y. 1974). See also *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732-734 (3rd Cir., 1970); *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080,

(Footnote continued on following page)

II.

APPLICATION OF THE *CORT v. ASH* TEST COMPELS THE CONCLUSION THAT NO PRIVATE RIGHT OF ACTION EXISTS UNDER THE CEA.

Rosenthal chooses not to argue the application of the *Cort v. Ash* test to determine whether a private cause of action may be implied under the CEA. Instead it defers to the many discussions on this question in the many briefs filed with the Court. Concerning the first point of the *Cort v. Ash* test, Rosenthal makes one reference to the concurrence of Justice Stevens in *Middlesex County Sewerage Authority v. National Sea Clammers, supra.* Justice Stevens agreed with the majority that no private right of action could be implied under the Federal Water Pollution Control Act ("FWPCA") and the Marine Protectors, Research and Sanctuaries Act of 1972 ("MPRSA"). His analysis, however, was not based simply on Congressional intent alone but included consideration of the breadth of the class benefited. Justice Stevens concluded that the FWPCA and MPRSA were not written to benefit a special class. A comparison of the language of the CEA with pertinent sections of the FWPCA and the MPRSA reveals that the CEA is at least as broadly written. The CEA is clearly "enacted for the protection of the marketplace as well as the

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[2] *continued*

1094-1095 (S.D.N.Y. 1977); *Fox v. Prudent Resources Trust*, 382 F. Supp. 81, 90-92 (E.D. Pa. 1974); *Young v. Seaboard Corp.*, 360 F. Supp. 490, 497 (D. Utah 1973); *Courtland v. Walston & Co., Inc.*, 340 F. Supp. 1079, 1082-1085 (S.D.N.Y. 1972). Two district courts have held that private remedies do not exist. See *Greenspan v. Del Toro*, (1975-1976) CCH Fed. Sec. L. Rep. ¶95,488 (S.D. Fla. 1974); *Gammage v. Roberts, Scott & Co., Inc.*, (1974-1975) CCH Fed. Sec. L. Rep. ¶94,761 (S.D. Cal. 1974). Those two decisions are of little effect because they are from circuits (the Fifth and Ninth) in which appellant opinions thereafter allowed private actions.

general public" and for this reason alone does not lend itself to private implication. Section 3 of the CEA, 7 U.S.C. §5.

CONCLUSION

For the reasons stated above, the Sixth Circuit Court of Appeals erred in implying a private right of action under the CEA. Rosenthal respectfully submits that the Court should reverse the Sixth Circuit's decision and that the Currans should be required to pursue this action in a reparation proceeding before the CFTC.

Respectfully submitted,

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